

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

77-7083

In The
United States Court of Appeals
For The Second Circuit

EUGENE E. NERVINA,
Plaintiff-Appellant,

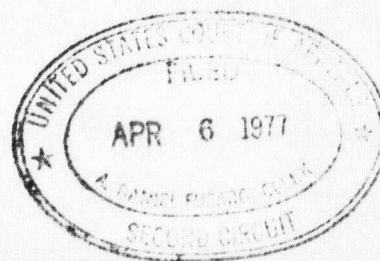
vs.

LIEBERT CORPORATION, JOHN AMBROSE, and JAMES
W. GOOD,
Defendants-Appellees.

*On Appeal from the United States District Court for the
Southern District of New York.*

**SUPPLEMENTAL APPENDIX
STATEMENT OF THE PROCEEDING**

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STATEMENT OF THE PROCEEDING (pp. 1sa-7sa)

~~DISTRICT COURT~~UNITED STATES ~~COURT OF APPEALS~~
SECOND CIRCUIT — ~~SOUTHERN DISTRICT OF N.Y.~~

MAR 23 1977

D. OF N. Y.

EUGENE E. NERVINA,

Plaintiff-Appellant,

Docket No. T-7072
77-7083

-against-

AFFIDAVIT

LIEBERT CORPORATION, JOHN AMBROSE
and JAMES W. GOOD,

Defendants-Respondents.

76 Civ. 444
(P.B.B.)

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

JON PAUL ROBBINS, being duly sworn, deposes and says:

1. I am associated with the firm of Seward & Kissel, attorneys for defendants-respondents ("respondents") and I argued respondents' motion to dismiss the complaint in this action before the Honorable Dudley B. Bonsal on January 10, 1977. In accordance with Rule 10 (c) of the Federal Rules of Appellate Procedure Seward & Kissel submits the annexed counter-statement of the proceedings before Judge Bonsal for settlement, approval and inclusion in the Record on Appeal. The source of the counter-statement is my recollection of the argument before Judge Bonsal.

Jon Paul Robbins
Jon Paul Robbins

Sworn to before me
March 14, 1977

Irene A. Blochl
Notary Public

IRENE A. BLOCHL
Notary Public, State of New York
No. 30-4617905
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1977

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

2sa

----- x
EUGENE E. NERVINA, :

Plaintiff-Appellant, :

-against- :

LIEBERT CORPORATION, JOHN AMBROSE :
and JAMES W. GOOD, :

Defendants-Respondents. :

Docket No. T-7072
77-7083

COUNTER-STATEMENT
OF PROCEEDINGS

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1. Judge Bonsal indicated he had read the papers on the motion, and asked counsel for defendants-respondents ("respondents") to commence the argument. Counsel stated that plaintiff-appellant ("appellant") was trying to resurrect claims which, if they ever existed at all, were extinguished in August 1976 when he signed a general release and accord and satisfaction. Counsel then briefly summarized the facts of the case, and explained that when appellant, a former employee of respondent Liebert Corporation ("Liebert") resigned, Liebert and appellant disagreed as to Liebert's obligations to him. However, they settled the dispute and appellant, after consulting with his lawyer, who also represents him in this action, executed the August 10, 1976 document which is a complete defense to this action. That document provided that in consideration of Liebert making certain payments appellant agreed that his relationship with Liebert was terminated and released and discharged "any and all claims" he might have had at the time.

2. Counsel then discussed the applicable authorities. The law in New York is that a general release discharges all claims existing at the time the release is executed. Since any claims appellant may have had predated his execution of the August 10 document, those claims were extinguished when he

signed the document and accepted payment under it. Counsel 3sa noted that appellant's affidavit in opposition to the motion did not state he had not intended to discharge all claims he might have had, and that this was not surprising since his counsel presumably explained the document's meaning before appellant signed it. Counsel said appellant signed a general release, and this action is an attempt to limit its effect to his claim for bonus payments. The document contains no such limitation, and appellant cannot change its terms after signing it and accepting payment under it.

3. Counsel also stated that the August 10, 1977 document operated as an accord and satisfaction as well. Appellant's only argument that it was not an accord was that he was paid all he claimed was due him. But the very existence of this lawsuit proves that is not so. Appellant claims he was damaged in the amount of \$600,000, but he settled for less. This meets the classic definition of an accord and satisfaction, and discharges all of appellant's claims.

4. Judge Bonsal asked counsel to discuss appellant's counsel's argument that appellant signed the document under duress. Counsel said the record contained no evidence of duress. Appellant's affidavit in opposition to the motion did not state he was coerced into signing the document. The only claim of duress was made in appellant's counsel's memorandum of law, and those contentions are not evidence. Counsel for respondents said it is merely good business sense to require a general release before making a payment under a settlement, and that is why Liebert required such a release prior to making a payment it felt it was not obligated to make. It wanted an assurance that its dispute with appellant was finished and that the relationship between the parties was over. Respondents' counsel

stated that appellant's counsel could not claim there was duress **4sa** when there was no claim of duress in the record and when appellant had consulted with him before signing the August 10 document.

5. Counsel then discussed the cases cited in appellant's memorandum in opposition to the motion. Each of those cases involved situations when a release was asserted as a defense to claims which did not exist when the release was signed, and to which the release could not possibly apply, or when the release provision was followed by a limiting reference to a particular claim. Here, appellant's claims predated the release, and there is no language limiting the release's effect to a particular date.

6. Judge Bonsal then asked appellant's counsel to present his argument. Counsel argued that the general release language on the second page of the August 10, 1976 document was limited by the reference on the first page to the dispute over bonus payments. Judge Bonsal read aloud the language of the release that appellant discharged "any and all claims" and asked counsel where the limitation was. Counsel repeated his contention that the release was limited by the first page of the document and did not apply to the causes of action asserted in the complaint.

7. Counsel then argued the release was signed under duress because appellant needed the money he received from Liebert. Judge Bonsal asked counsel if appellant had consulted him before signing the document. Counsel said appellant had consulted him.

8. Counsel then argued that the complaint alleged 5sa
respondents had wrongfully obtained trade secrets from appellants
and had breached an agreement with appellant. Counsel also
argued there was no consideration given for the general
release.

9. Judge Bonsal asked appellant's counsel if he
wished to present additional argument. Counsel said he did
not. Judge Bonsal then stated that the motion to dismiss the
complaint would be granted and that it would be so ordered.

New York, New York
March 14, 1977

SEWARD & KISSEL

By

George R. Levy
A Member of the Firm
63 Wall Street
New York, New York 10005
(212) 248-2800

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 : ss.:
 COUNTY OF NEW YORK)

JON PAUL ROBBINS, being duly sworn deposes and says:

1. I am not a party to this action, am over 18 years of age and reside at 145 East 27th Street, New York, New York, 10016.

2. On March 16, 1977, I served the annexed Affidavit and Counter - Statement of Proceedings on:

Berstein & Mahoney
 Attorneys for Plaintiff - Appellant
 One Springfield Avenue
 Cranford, New Jersey 07016

attorneys in the action at the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service with the State of New York.

Jon Paul Robbins
 JON PAUL ROBBINS

Sworn to before me
 March 16, 1977

Irene A. Blochl
 Notary Public

IRENE A. BLOCHL
 Notary Public, State of New York
 No. 61-13545
 Qualified in Dutchess County
 Commission Expires March 16, 1981

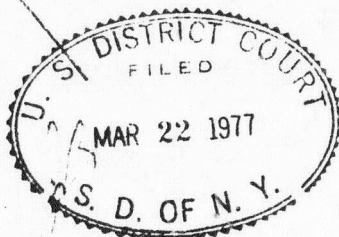
Eugene E. Nervina v. Liebert Corporation,
John Ambrose and James W. Good, 76 Civ. 4841

7sa

Pursuant to Rule 10 of the Federal Rules of Appellate Procedure, the attached Counter-Statement of Proceedings is hereby approved as the Statement of Proceedings of defendants' motion to dismiss the complaint, argued before this Court on January 10, 1977.

It is so ordered.

March 22, 1977



Irish B. Bag

U. S. D. J.

T-7072
Docket No. 77-7083

STATES COURT OF APPEALS

CIRCUIT

E. NERVINA,

Plaintiff-Appellant,

-against-

T CORPORATION, JOHN
E and JAMES W. GOOD,

Defendants-Respondents.

AFFIDAVIT AND
COUNTER-STATEMENT

SEWARD & KISSEL

Attorneys for
Defendants-
Respondents

63 WALL STREET
NEW YORK, N. Y. 10005
212 248-2800

FEDERAL COURT
SECOND CIRCUIT

EUGENE NERVINA,
Plaintiff-Appellant,

- against -

LIEBERT CORP., JOHN AMBROSE & JAMES
W. GOOD,

Defendants-Appellees.

On Appeal from the U.S Dist Court for the
Southern District of NY

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 1 day of April, 1977 at 63 Wall St.
New York, N. Y.

deponent served the annexed

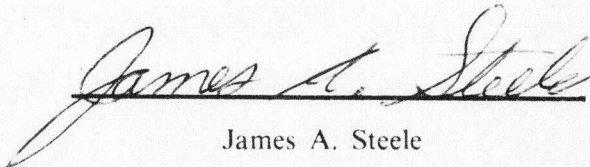
Supp. Appendix

Seward & Kissel, Esqs. upon

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 1
day of April, 1977

ROBERT T. DEAN
NOTARY PUBLIC, New York
No. 11-111111-000
Qualified in New York County
Commission Expires March 30, 1977


James A. Steele